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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 266

W. T. HAGANS
Petitioner

V.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For The Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For The Fifth Circuit

Petitioner, W. T. Hagans, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on the 21st day of March, 1963.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R 348) is reported in 315 F2d 67 and is reproduced in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on the 21st day of March, 1963, (R 355). Petitioner filed a petition for a rehearing after a timely extension was obtained on the 21st day of April, 1963, (R 357), which was denied by the Court of Appeals without opinion on the 22nd day of May, 1963. The jurisdiction of this Court is envoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

1. Was petitioner's immunity from unreasonable searches and seizures as guaranteed under the Fourth Amendment to the Constitution of the United States violated when at least seven federal and state law enforcement officers at 1:30 a.m. stormed his home in which his wife and aunt were sleeping and one of said officers arrested petitioner on his back steps, and another officer simultaneously entered petitioner's residence and arrested a man therein who did not live there, the remaining officers searching an automobile parked in the yard near the house and further opening and searching a closed garage and attached room located some 65 feet from the house, and finding evidence which was used in the Federal prosecution of petitioner, the circumstances being as follows:

a. The officers were armed with an arrest warrant for petitioner and a second arrest warrant for one J. B. Smith, the man in the house, both issued and dated April 24, 1961, upon a complaint reciting the following facts:

> "On March 1, 1961, Melvin Daniels purchased 25 gallons of non-tax-paid whiskey from W. T. Hagan and J. B. Smith in Upson County, Georgia, and delivered this non-taxpaid whiskey to Investigator Williams and me in Bibb County, Georgia."

and the search and seizure in question occurred 54 days after the date of the violation recited in the complaint, viz., March 1, 1961.

b. The arrest warrants were returned to the clerk of the court April 25, 1961, marked executed.

c. The officer who entered the house, prior to his entry, saw a man in the house but did not know who that man

was, did not know J. B. Smith (the man named in the warrant) by sight, did not make any inquiries as to the identity of J. B. Smith but entered for the purpose of searching the house and arresting J. B. Smith solely on the basis of having been informed of the transactions referred to in subparagraph h below.

d. There was no consent given for any entrance upon or search of the premises.

e. The officer who arrested petitioner had been informed of the transactions referred to in subparagraph h below.

f. The complaint upon which the warrants were issued did not state the identity or reliability of the said Melvin Daniels who was the only person according to the facts recited in the complaint to show that the named subjects had violated the law.

g. The said Melvin Daniels was a paid informer who had informed the officers sufficiently in advance so that a search warrant could have been obtained that he had made arrangements with petitioner to purchase whiskey on the premises that night from petitioner.

h. The officer who first searched the car and the garage had purchased whiskey from petitioner and J. B. Smith on t. e premises on two occasions, 50 days and 47 days, respectively, prior thereto and on the first of these occasions, the whiskey had been stored in the searched automobile while parked in the searched garage.

i. The search of the garage and adjoining room was thorough and purely exploratory.

2. Assuming the search and seizure referred to in question one was unreasonable and should have been sup-

pressed, did the admission thereof into evidence, under the facts disclosed by the record herein, unduly prejudice petitioner as to the remaining counts?

3. Should not petitioner's plea of entrapment have been sustained by the Court when, as the record discloses, within three months of petitioner's release from federal confinement an informer was employed by the United States to contact petitioner in an effort to induce and lure him back into criminal activity even though at the time petitioner was ill, was not engaged in criminal activity of any kind, but to the contrary, was endeavoring to rehabilitate himself by legitimate employment.

STATUTES AND FEDERAL RULES INVOLVED

Sections 5205 (a) (2), 5604 (a) and 7608 of Title 26, U.S.C.A.; Rule 41 (e) Federal Rules Criminal Procedure, Rule 3, Federal Rules Criminal Procedure, all of which are set forth in the appendix.

STATEMENT OF THE CASE

Petitioner was indicted in a ten count indictment charging various offenses against Internal Revenue laws of the United States relating to illicit whiskey, to-wit:

Counts One, Two and Three charged respectively the possession, transportation and selling of illicit whiskey on March 1, 1961.

Counts Four, Five and Six charged respectively the possession, transportation and selling of illicit whiskey on March 5, 1961.

Counts Seven, Eight and Nine charged respectively the possession, transportation and selling of illicit whiskey on March 8, 1961.

Count Ten charged the possession of illicit whiskey on April 25, 1961.

On April 12, 1962, petitioner timely filed his motion to suppress as evidence against him the whiskey seized on April 25, 1961, the subject matter of Count Ten, as being seized against his will, without a search warrant and not incident to any lawful arrest.

The motion was heard by the court and evidence presented in Chambers at Macon, Georgia, on April 23-24, 1962 and on April 24, 1962 the court overruled the motion.

Petitioner entered his plea of not guilty as to all charges and was tried before a jury on April 24-25, 1961, at Macon, Georgia.

On April 24, 1962, at the close of the prosecution's evidence, petitioner made a motion for judgment of acquittal as to each count on the grounds of insufficient evidence which motion was granted as to Count Two and overruled as to all other counts. Petitioner at this time renewed his motion to suppress which was overruled.

On April 25, 1962 at the close of all the evidence petitioner renewed his motion for judgment of acquittal as to each count on the grounds of insufficient evidence and renewed his motion to suppress, all of which were overruled.

On April 25, 1962 the jury found petitioner guilty on Counts One, Three, Four, Six, Seven, Nine and Ten and

not guilty as to Counts Five and Eight, that is to say, petitioner was not convicted on any of three transportation counts.

Petitioner was sentenced to serve a term of four years on each count upon which he was convicted, the terms to run concurrently.

Petitioner timely filed his notice of appeal on April 25 1962, and on appeal, his conviction was affirmed. His petition for rehearing was denied on May 22, 1963.

A. ON MOTION TO SUPPRESS

On April 25, 1961, at approximately 1:30 a.m. Federal agents drove into the driveway of petitioner's residence. They had two arrest warrants, each dated April 24, 1961, calling for the arrest of petitioner and one J. B. Smith. The complaint, upon which said warrants were issued was dated April 24, 1961, was signed by Agent Ferguson, and recited the following facts:

> "On March 1, 1961, Melvin Daniels purchased 25 gallons of nontaxpaid whiskey from W. T. Hagan and J. B. Smith in Upson County, Georgia, and delivered this non-taxpaid whiskey to investigator Williams and me in Bibb County, Georgia."

Following closely behind was a second car containing Agent Ferguson and three more agents. (R. 43). The first car drove in and stopped behind the house. The [illegible] jumped out and, petitioner then came out on the back porch and onto the back steps.

Agent Richards went up to petitioner, told him he had a warrant for his arrest and placed him under arrest.

Another agent simultaneously went to the back door, saw a man sitting in the living room and immediately proceeded to enter even though he did not recognize the man or know who he was. (R. 11). He stated that his reason for believing that the man inside was J. B. Smith was based upon information from a reliable informer and Agent Anderson that Smith was at the house on three prior occasions (the last occasion being March 8, 1961, some six weeks prior) (R. 33). Petitioner's wife and visiting aunt who were in bed sleeping in separate bedrooms testified that Agent Williams opened each of their bedroom doors and turned on their lights. After reaching the man in the living room, Agent Williams caused the man to identify himself as Smith and placed him under arrest (relying on the arrest warrant R. 178). The Agent did not have or seek permission to enter the house. R. 24).

During this time an agent had searched a car parked in the yard and found illicit whiskey in the trunk. (R. 14, 78, 80). The officers then proceeded to a garage located across the drive and some 65 feet to the rear of the house. One opened the closed double doors and found inside a Ford automobile with illicit whiskey in it. (R. 9, 80, 83). The officers then proceeded to mill around inside and out of the garage and in and out of a room on the back of the garage moving things and turning over things in an exploratory search looking for things they did not know or have reason to believe were there. (R. 89, 90, 100).

Petitioner's wife testified that the garage was locked before the officers went to it and that the next morning she found on the ground by the garage doors the broken chain and lock that had secured the garage doors. (R. 168, 169, 203). Also that the ceiling in a room back of the garage was down indicating the agents in their search had

climbed above the room into a storeplace for her personals and had knocked down the ceiling. (R. 198-201).

Thereafter the officers left with the two autos in which the liquor was found, another car parked in the yard and their two prisoners. The same day the arrest warrant was returned to the court marked executed as to both subjects.

Agent Ferguson had been supervising an undercover investigation concerning numerous believed violators. (R. 60) and had hired one Melvin Daniels, who was known by him to have been previously connected with illicit whiskey operations. (R. 68, 69). Daniels had been found by Ferguson to be reliable on most information although most that he gave was negative. (R. 61).

On March 1, 1961, Daniels met Ferguson in Bibb County, Georgia, and turned over to him 25 gallons of non-tax paid whiskey. (R. 33, 34, 61).

Agent Anderson had been to the house on two prior occasions. (R. 73). On March 4, 1961, he and Daniels had a conversation with petitioner as to Daniels coming to petitioner's house on March 5, to get illicit whiskey. (R. 90, 91). (R. 91, 92). On the evening of March 5, Anderson and Daniels went to petitioner's house, met Smith and petitioner and paid for whiskey which petitioners got from an automobile (the same one searched and seized on April 25, 1961). (R. 92-94). Arrangements were then made for additional purchases. (R. 93). On March 8, 1961, Anderson and Daniels went to petitioner's residence and Smith drove off in the government car and came back with some non-taxpaid whiskey which they purchased. (R. 95). On March 9, 1961, Agent Anderson met petitioner and paid him the balance due on whiskey he had previously purchased and

made arrangements for more later. (R. 97). Prior to April 24, 1961, Anderson informed Agent Ferguson about these transactions. (R. 98). On April 25, 1961, when he went to petitioner's house, he had seen the arrest warrant for Smith and petitioner. Although arrangements had been made to purchase whiskey from petitioner that night, he did not know whether or not to expect the whiskey to be at petitioner's residence or elsewhere. On March 8, 1962, he expected it to be in the garage but it wasn't. Nevertheless, he conducted an exploratory and general search of the garage. He didn't know anything about the transaction on March 1, 1961, referred to in the warrant complaint. (R. 99-100).

Agent Williams testified that on April 24, 1961, Daniels placed a call from his office in Macon to petitioner at his residence in Thomaston and informed him (Williams) that arrrangements had been made to get some whiskey from petitioner that night. (R. 177). Agent Ferguson testified that according to his records, this telephone call was made prior to 3:00 o'clock on the afternoon of April 24, 1961. (R. 216).

At the time of his arrest of petitioner, Richards had been informed of the three prior whiskey transactions, by the informer as to the first and by Anderson as to the second and third and that he had been further informed that arrangements had been made to pick up whiskey that evening, but that the basis for his arrest of petitioner was the warrant. (R. 123-127).

B. ON TRIAL OF CASE

Daniels, an unemployed former Internal Revenue law violator, voluntarily went to Federal agents and offered his services as an informer for a price. He was hired at the rate of $10.00 per day, and on February 27, 1961, called pe-

titioner's house and asked to speak to petitioner. When advised he wasn't there, Daniels proceeded to talk to petitioner's wife and told of his (Daniels) wife's hospitalization and that he needed money and wanted to talk to petitioner about buying illicit liquor. (R 289)

Petitioner had been released from a federal penitentiary the preceding November and was, at the time, in bad physical condition, had an ulcerated stomach, was nervous and confined to his bed a great deal of the time. (R 291) Daniels, within a few days, came to see petitioner, talked for an hour or so to him about buying illicit whiskey and repeatedly asked petitioner to get him some liquor and told of being broke, having no job and of his wife's being in the hospital, and finally caught petitioner "off balance". (R 309). On March 1, 1961, petitioner made some arrangements with others to get Daniels illicit whiskey—on credit—and made no profit on the deal. (R 309). Three or four days thereafter, Daniels took Agent Anderson to meet petitioner, with both Daniels and the agent misrepresenting the agent's identity, and on March 4, March 5, March 8 and April 25, the two either participated in or knew of arrangements for the purchase of illicit whiskey from petitioner, government funds being used in each instance. (R 227).

Petitioner admitted his previous convictions for illicit whiskey, but vowed that upon his release from his latest confinement he would remove himself from that activity and engage in legitimate employment, and had, in fact, been repairing automobiles since his release for a living. (R 207).

Character evidence disclosed petitioner had a good reputation in his community from the time of his latest release

(November, 1960) to the date of the informer's first contact. (R 316-17)

REASONS WHY THE WRIT SHOULD BE GRANTED

The Court of Appeals below has decided the important question that the forceful nightime entry into a private dwelling for the purpose of making an arrest is justified when the officers have probable cause to believe that the person therein has committed a felony. This issue has never been decided by this Court as in JONES V. UNITED STATES, 357 U.S. 493, 2 LEd 2d 1514, 78 S.Ct. 1253, the question was found not to be fairly presented by the record therein. However, this Court then and there said such an issue "would confront us with a grave constitutional question." The question is now squarely presented by this record and is therefore suitable for determination and settlement by this Court.

Further, the Court of Appeals below has by-passed the determination of a necessarily related question which has never been decided by this Court, but which determination is essential to fully answer the query posed in JONES V. UNITED STATES, supra. That is, whether an arrest warrant which is used to gain forceable entry into a private dwelling at 1:30 a.m. is valid when it is based solely on a complaint which contains rank hearsay information to show the violation of law by accused or any involvement of accused whatsoever and without any other information recited therein by affiant, either of his own knowledge of the violation or as to the reliability and trustworthiness of the hearsay.

The complaint merely recited the following:

> "On March 1, 1961 Melvin Daniels purchased 25 gallons of nontaxpaid whiskey from W. T. Hagans and J. B. Smith in Upson County, Georgia, and delivered this nontaxpaid whiskey to Investigator Williams and me in Bibb County, Georgia." (R 351)

and was signed by Agent Ferguson. Or as abstractly stated, X bought from Y, so deposeth Z.

Whether hearsay information is sufficient to support a warrant was specifically omitted from determination by this Court in GIORDENELLO V. UNITED STATES, 357 U.S. 480, 2 LEd 2d 1503, 78 SCt 1245.

This question is of recurring significance and should be settled by this Court so as to provide guidelines for agents and magistrates alike and insure the continuance of the protective purposes for which a complaint is designed to achieve.

Under the facts and circumstances existent at the moment of arrest and as factually set forth in question number 1, the officers cannot justify their actions by either of the only two possible means:

First, the arrest warrants they possessed were invalid and could not be relied upon at that time of night to effectuate an arrest in the manner shown.

Second, the officers cannot derive probable cause to arrest an accused at 1:30 a.m. by forceful entry into his private dwelling from either of the following means: (a) an arrangement made the afternoon before to purchase illicit whiskey which was never consummated (b) information, 54 days old, received from an informer (c) information obtained from an undercover agent as to violations

which occurred, 51 and 48 days, respectively, prior to the nighttime arrest.

It is essential to a just determination of one's rights under circumstances similar to those here that the validity of the arrest be determined.

The complaint is wholly lacking in the essentials which show probable cause. Absolutely nothing is shown which leads the magistrate to conclude that X is worthy of belief. To uphold this complaint would do violence to the protective provisions of not only Rule 4 but the Fourth Amendment as well. It would license law enforcement officials to obtain nighttime entry into any citizen's house simply because one, whether from honest belief, prejudice, bias or plain vindictiveness, told the officer that such citizen had violated the law. It would bridge the gap that separates impartial appraisement of the basis of arrest by a magistrate from unfettered police action. It makes no difference whether the crime be liquor, larceny or plain trespassing. Forceful nighttime instrusion without a valid warrant can never be justified under non-emergency conditions.

This necessarily involves the propriety of permitting officers to wait, 54, 51 or 48 days and then, at a moment arbitrarily convenient to them, effectuating an arrest in the curtilage of the accused. The legislative history of 18 USC 3052, (a statute similar to 26 USCA 7608) relating to the powers of Federal Bureau of Investigation agents to arrest without a warrant discloses that the principal function of such a statute is to facilitate the ability of law enforcement agents to make arrests in emergency situations where quick action is essential. House report number 1824, Seventy Third Congress, Second Session, 1934. For the of-

ficers in this instance to rely upon information obtained four to five weeks prior to the arrests in question is clearly not consistent with action under emergency situations.

Thus, the validity of the warrant must be determined so as to put into proper perspective the query of JONES V. UNITED STATES, supra. Absent authority under a warrant, the actions of officers in storming the private premises of an accused at night is so foreign to the philosophy of the Fourth Amendment as to require this Court to set at rest once and for all what is permissable and is not permissable when one elects to depend on probable cause for his key. We point out that, in fact, the officers below were not relying upon probable cause but solely on the warrant, as evidenced by their own admissions, the execution and return thereof. Probable cause was injected by the district court and followed by the Court of Appeals. Had the officers furnished some rational explanation of why they could not have obtained a warrant, it might have met the warning set forth in JONES, supra. However, by obtaining an invalid warrant their actions are open to criticism since they cannot now justify their conduct when ample time and opportunity existed in which to take the accused into custody without doing violence to his rights under the Fourth Amendment.

Aside from all the foregoing, the record herein discloses that the search and seizure was a general exploratory one far beyond the limits of being incident to any arrest. Viewed in that light, such falls squarely within the prohibition of such cases as GOBART IMPORTING COMPANY V. UNITED STATES, 282 U.S. 344, 51 SCt 153, 75 LEd 374, and UNITED STATES V. LEFKOWITZ, 285 U.S. 452, 52 SCt 420, 76 LEd 877.

The factual situation as to the entrapment of petitioner comes within the proscription of SORRELLS V. UNITED STATES, 287 U.S. 435. Petitioner recognizes that law enforcement officials should be granted wide latitude in the apprehension of persons accused of crime and can resort to various devices to apprehend them. Such is constitutionally approved as a means of apprehending law violators. For such authority to be used to instigate, induce and persuade one undergoing a voluntarily imposed period of rehabilitation after his release from confinement in a penitentary is repugnant to the administration of justice and the lawfully imposed obligations upon arresting officers. The record herein is absolutely silent as to any activity of appellant between the time of his release and the time of his first contact with the informer as would indicate his reputation and propensity to engage in illicit activity.

The holding below closely approaches the proposition that a prior conviction of an accused destroys as a matter of law a defense of entrapment.

CONCLUSION

The questions presented by this case are of great and recurring significance in the administration of the criminal law. The serious questions of public policy and individual rights involved here and the effect of the decision below, if not reviewed and reversed, make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

For these reasons and the reasons set forth above, it is respectfully submitted that the petition for the writ of certiorari should be granted.

CERTIFICATE OF SERVICE

I, Joseph H. Davis, do certify that I have on the date shown below served the within petition (1) by mail upon the Solicitor General, Department of Justice, Washington 25, D. C., by depositing same in the United States Post Office with sufficient air mail postage prepaid, addressed to him at his post office address in accordance with Rule 33 (1) Supreme Court Rules, and (2) upon the Hon. Floyd M. Buford, United States Attorney, Middle District of Georgia, Post Office Box 118, Macon, Georgia, the attorney of record who represented the United States in the Court whose judgment is sought to be reviewed, by delivering same at the office of said counsel of record, in accordance with Rule 33 (2), Supreme Court Rules.

THIS 10 DAY of July, 1963.

Joseph H. Davis

J. SEWELL ELLIOTT
JOSEPH H. DAVIS
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Macon, Georgia
Counsel of record for petitioner

APPENDIX

Supreme Court of the United States

No._____, October Term, 1963

W. T. HAGANS,

Petitioner,

vs.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 11, 1963.

s/ HUGO L. BLACK
Associate Justice of the Supreme Court of the United States.

Dated this 20th
day of June, 1963.

OPINION

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19792

W. T. HAGANS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(March 21, 1963)

Before JONES and BELL, Circuit Judges, and GROOMS, District Judge.

GROOMS, District Judge: Appellant Hagans was tried on a ten-count indictment which charged him with the possession, transportation and selling of nontax-paid whisky on March 1, 5 and 8, 1961, and with possession only on April 25, 1961, in violation of Title 26, U.S.C., Sections 5205 (a) (2) and 5604 (a).

Appellant made a timely motion to suppress as evidence against him the 206 gallons of whisky seized on April 25, 1961, and the subject matter of count ten, as being seized without a search warrant and not incident to any lawful

arrest. His motion was denied, and he was put to trial on his plea of not guilty. He was acquitted on the transportation counts—two, five and eight—and convicted on all other counts, and was given four years concurrent sentencies on each of the latter counts.

Appellant was convicted in 1943, 1945, 1948 and 1958 for violating the internal revenue laws respecting nontax-paid liquor. He served time on each sentence and was released from the last sentence on November 2, 1960, four months, less one day, from the first offense here involved. He claimed that he was then in poor health, and that he had made up his mind never again to fool with moonshine, but was "caught off balance" and entrapped into doing so.

On February 27, 1961, Melvin Daniels, a paid informer, contacted appellant and made an arrangement to pick up a load of whisky. Pursuant to such arrangements, Daniels went to appellant's home, on March 1, 1961, and was met by him and J. B. Smith. He procured from them 25 gallons of whisky on credit. This contraband was removed from a 1947 Plymouth automobile parked in the backyard of the home. Later in the day, Daniels delivered this whisky to Agents William W. Williams and George D. Ferguson. A few days later, following a telephone contact with appellant, Daniels and Agent Thomas D. Anderson, whose true identity was then unknown to appellant, met the latter at a cafe in Macon, Georgia. Daniels there paid for the prior purchase, and the three discussed future purchases from appellant.

Daniels called appellant on March 5, 1961, and late in the day went to his home accompanied by Anderson. Appellant took them to the garage[1] located in the rear of the

1. Anderson testified that the car was in the garage. Daniels did not specifically refer to a garage, but said the car was "in a shelter out from his house."

house, opened the door, and removed 24 gallons of whisky from the trunk of the same 1947 Plymouth, and assisted in loading it into the Government car.

Daniels and Anderson returned to appellant's home on March 8, 1961. At the latter's request, Anderson loaned his car to J. B. Smith, who was sent by appellant to "go over and load the whisky." In about thirty minutes, Smith returned with 66 gallons of whisky. Anderson paid appellant $60.00 and promised the balance in a few days. On the next day, however, Anderson and Daniels met him at a cafe on the Columbus road and paid him the balance of $270.00.

On April 24, 1961, about three or four o'clock in the afternoon, Daniels made an arrangement and an appointment with appellant for a purchase and delivery of whisky at the latter's home around ten-thirty o'clock that night. Anderson accompanied by Williams and Agent Brooke L. Richards, who was aware of the dealings with appellant, arrived at the home about one-thirty o'clock on the morning of April 25th. They were followed closely by another car carrying two additional federal agents and two state agents. Anderson called to appellant, who came out of the house and met the first car as it arrived. When appellant saw the second car approaching he advised Anderson to turn his lights out quickly. Anderson did so.

Ferguson, who was in the second car, had kept himself posted on developments and during the 24th had obtained an arrest warrant[2] for appellant and Smith for the violation of March 1, 1961.

After the exchange between appellant and Anderson,

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2 The officers also had in their possession three daytime search warrants for cars. These were returned unexecuted. The arrest warrant was returned executed.

Richards advised him that they were Federal Agents and that they had a warrant for his arrest, and then promptly placed him under arrest. Williams, upon seeing a man in the house who he correctly assumed was Smith, proceeded into the house and placed him[3] under arrest. Anderson went to the old 1947 Plymouth parked nearby and found that it was loaded with 20 gallons of whisky. After this, the officers went to the garage, entered and found a 1951 Ford loaded with 186 gallons of whisky.

There is a dispute in the evidence as to the manner by which the officers secured entry into the garage. Appellant claims that the garage was locked and that the officers broke a chain to secure entrance. The officers say that the doors were not locked but secured only by a hasp.

Appellant disputes the validity of the arrest warrant on the grounds that the complaint[4] upon which it was issued was inadequate as based on hearsay and was defective in that no facts were recited which would disclose the existence of probable cause.

The lower court did not rule on the validity of the arrest warrant, but held that Richards had reasonable grounds for believing that appellant had committed a felony, and that, accordingly, the arrest was justified and the search and

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3. Smith entered a plea of guilty and did not testify in the case.

4. Agent Ferguson stated the complaint was based on facts which were:
"On March 1, 1961, Melvin Daniels purchased 25 gallons of nontax paid whiskey from W. T. Hagans and J. B. Smith in Upson County, Georgia, and delivered this nontaxpaid whiskey to Investigator Williams and me in Bibb County, Georgia."

5. Section 7608 (b) (2) (B), enacted September 2, 1958, provides that any internal revenue agent charged with the duty of enforcing any of the criminal provisions of the internal revenue laws is authorized:
"to make arrests without warrant for any offense against the United States relating to the internal revenue laws committed in his presence, or for any felony cognizable under such laws if he has reasonable grounds to believe that the person to be arrested has committed or is committing any such felony."

seizure was proper as an incident to a valid and lawful arrest. *United States v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653; *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327.

We will not attempt a summation of those facts which point to the conclusion that when Richards arrested appellant he possessed knowledge and reasonable trustworthy information under all the facts and circumstances sufficient to meet the test of probable cause. *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543, but rest the conclusion on the facts recited.

Hewing to the line marked by the lower court, we are of the opinion, and so rule, that the court did not err in holding that Richards had reasonable grounds for believing that appellant had committed a felony, that his arrest was justified, and that the search and seizure was proper as an incident to a valid and lawful arrest, and was made in a lawful and reasonable manner. The fact that the arrest warrant may have been invalid, a fact which we do not decide, would not alter the results, since the Government may, and has justified it by showing that at the time of the arrest, a lawful arrest could have been made without a warrant. See *Dibella v. United States*, 2 Cir., 284 F.2d 897, 904, where the lower court was upheld in denying a motion to suppress.[6] *Williams v. United States*, 9 Cir., 273 F.2d 781; *United States v. Ramirez*, 9 Cir., 279 F.2d 712, footnote 1; *United States v. Russian*, D.C. Conn., 192 F. Supp. 483; *Giordenello v. United States*, 357 U.S. 480, 488, 78 S.Ct. 1245, 2 L.Ed.2d 1503.[7]

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6. The Supreme Court vacated the judgment and remanded the case with instructions to dismiss the appeal on the ground that the district court's order was interlocutory and not appealable. 369 U.S. 121.

7. The Court, in reversing the case on account of the invalidity of the arrest warrant, the Government having relied entirely on the validity of the warrant in the courts below, stated:

"This is not to say, however, that in the event of a new trial the Government may not seek to justify petitioner's arrest without relying upon the warrant."

Since the search and seizure of April 25, 1961, was proper and lawful as an incident to a valid and lawful arrest, we do not reach appellant's claim that the presence of the whiskey at the trial obtained on that occasion prejudiced his trial upon the other counts of the indictment.

The question of entrapment was one of fact for the jury on conflicting evidence and was submitted on a comprehensive, fair, and legally accurate instruction which followed very closely the language employed by this Court, in *Hamilton v. United States*, 221 F.2d 611, 614, and *Demos v. United States*, 205 F.2d 596, 599, and by Judge Sibley, as District Judge, in *United States v. Wray*, D.C.N.D. Ga., 8 F.2d 429. Nothing therein contravenes the tests of *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413, or *Sherman v. United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848.

The case is AFFIRMED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19792

W. T. HAGANS,

Appellant

versus

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court for the Middle District of Georgia

---

(May 22, 1963)

ON PETITION FOR REHEARING

Before JONES and BELL, Circuit Judges, and GROOMS, District Judge.

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be and the same is hereby DENIED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19792

D. C. Docket No. 7856 Criminal

W. T. HAGANS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before JONES and BELL, Circuit Judges, and GROOMS, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 21, 1963

Issued as Mandate:

STATUTES AND FEDERAL RULES INVOLVED

26 USCA 5205 (a) (2). Stamps.

(a) Stamps or containers of distilled spirits.—

(1) Containers of distilled spirits bottled in bond.—Every container of distilled spirits bottled in bond under section 5233 when filled shall be stamped by a stamp evidencing the bottling of such spirits in bond under the provisions of this paragraph and section 5233.

(2) Containers of other distilled spirits.—No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof is stamped by a stamp evidencing the determination of the tax or indicating compliance with the provisions of this chapter. The provisions of this paragraph shall not apply to—

(A) distilled spirits, lawfully withdrawn from bond, placed in containers for immediate consumption on the premises or for preparation for such consumption;

(B) distilled spirits in bond or in customs custody;

(C) distilled spirits, lawfully withdrawn from bond, in immediate containers stamped under other provisions of internal revenue or customs law or regulations issued pursuant thereto;

(D) distilled spirits, lawfully withdrawn from bond, in actual process of rectification, blending or bottling, or in actual use in process of manufacture;

(E) distilled spirits on which no internal revenue tax is required to be paid;

(F) distilled spirits lawfully withdrawn from bond and not intended for sale or for use in the manufacture or production of any article intended for sale; or

(G) Any regularly established common carrier receiving, transporting, delivering, or holding for transportation or delivery distilled spirits in the ordinary course of its business as a common carrier.

Rule 3. Federal Rules of Criminal Procedure

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or officer empowered to commit persons charged with offenses against the United States.

Rule 4 (a).

If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. . . .

Rule 41 (e):

A person aggrieved by an unlawful search and seizure may move the District Court for the district in which the property was seized for the return of the property and to suppress for the use of evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was is-

sued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. . . .

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 266

W. T. HAGANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 348-354) is reported at 315 F. 2d 67.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1963. A petition for rehearing was denied on May 22, 1963. Mr. Justice Black extended the time for filing a petition for a writ of certiorari

to and including July 11, 1963. The petition was filed on July 11, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's arrest and the subsequent search were justified upon the basis of probable cause.

2. Whether the search of petitioner's garage and automobiles and the seizure therefrom of 206 gallons of nontax-paid whisky were reasonable.

3. Whether the record shows entrapment of petitioner as a matter of law.

STATEMENT

Petitioner was convicted on April 25, 1962, after trial by jury in the United States District Court for the Middle District of Georgia, on seven counts of a ten count indictment charging him with the possession, transportation and selling of nontax-paid whisky, in violation of 26 U.S.C. 5205(a)(2) and 5604(a), and was sentenced to imprisonment for four years on each count, the sentences to run concurrently. He asserts as error the denial of his pretrial motion to suppress as evidence the 206 gallons of nontax-paid

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[1] Counts one, two and three charged, respectively, possession, transportation and sale on March 1, 1961; counts four, five and six, possession, transportation and sale on March 5, 1961; counts seven, eight and nine, possession, transportation and sale on March 8, 1961; and count ten, possession on April 25, 1961. A co-defendant, J. B. Smith, pleaded guilty.

whisky seized incident to his arrest, and the denial of his motion for judgment of acquittal on the basis of entrapment.

1. *Motion to Suppress*

On March 1, 1961, Melvin Daniels, an informer whom the Macon, Georgia, office of the Alcohol and Tobacco Tax Division, United States Treasury Department, had found to be reliable (R. 61, 69), delivered to Special Investigators William W. Williams and George D. Ferguson of that office 25 gallons of nontax-paid whisky which he stated he had purchased from petitioner (R. 61), who was considered a major violator (R. 31), who had been convicted four times for this offense (R. 305). Thereafter, Criminal Investigator Thomas D. Anderson of the Atlanta office was assigned to work with Daniels in an undercover capacity (R. 70). On March 4, Daniels introduced him to petitioner as "Andy Thomas" (R. 236), purporting to be in the whisky business (R. 238). After some discussion as to price, it was agreed that Daniels and Anderson would pick up a quantity of whisky from petitioner the following night at his residence (R. 91, 221). Anderson saw Daniels hand petitioner the money for the whisky obtained on March 1 (R. 243).

On March 5, at about 9:00 p.m., Anderson and Daniels went to petitioner's house, were met by petitioner and J. B. Smith, and, after paying petitioner $120, received 24 gallons of nontax-paid whisky. Smith helped load the whisky which was stored in a 1946 Plymouth in petitioner's garage. Petitioner

told them that he would have plenty of whisky the following Wednesday night, and would let them have it on credit if they did not have enough money (R. 92-93).

On Wednesday, March 8, at 10:30 p.m., Anderson and Daniels again went to petitioner's house, where they purchased 66 gallons for $330, paying $60 on account. Smith took their automobile to get the whisky (R. 95). Petitioner told them that it was not on hand because the prior payment with $20 bills had made him afraid of them (R. 223). Anderson paid petitioner the $270 balance on March 9 (R. 97).

On April 24, Daniels, in the presence of Special Investigator Williams, called petitioner from the Alcohol and Tobacco Tax office and placed an order for more whisky (R. 177). Petitioner told him not to come for it until 10:00 or 10:30 that night (R. 188, 252). A warrant for the arrest of petitioner and Smith was then obtained, based upon a complaint by Investigator Ferguson which stated:

> On March 1, 1961, Melvin Daniels purchased 25 gallons of nontaxpaid whiskey from W. T. Hagans and J. B. Smith in Upson County, Georgia, and delivered this nontaxpaid whiskey to Investigator Williams and me in Bibb County, Georgia.[2]

It was then arranged to arrest petitioner and Smith when Anderson picked up the whisky.

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[2] The arrest warrant was offered in evidence as exhibit G.1 (R. 35-36), and is set forth in the opinion of the court of appeals, 315 F. 2d at 69 n. 1 (R. 351-352).

Seven officers took part in the arrest (R. 18). They were all briefed on the previous transactions and the pending transaction between Daniels, Anderson, petitioner and Smith (R. 98, 115, 117, 118, 125, 182). Since the raid was one of a number of arrests made that night (R. 26), the officers did not arrive at petitioner's house until about 1:30 a.m. on April 25 (R. 71). The original plan for arresting petitioner was for the other officers to surround the house and effectuate the arrest after petitioner delivered the illicit whisky to Anderson, but because of dogs in the neighborhood it was not possible to get close enough to the house (R. 27-29, 105-106). Instead, Investigators Williams and Brooke L. Richards got into the automobile that Anderson was driving, and the other officers followed in another vehicle (R. 43, 71, 106). The arrest warrant, or a copy, was in the vehicle that Anderson was driving (R. 18, 35).[1] When Anderson drove up to the house, he called to petitioner who came out on the back porch and down the back steps. Then, seeing the lights of the second automobile approaching, petitioner told Anderson to put out his lights. At that point, at 1:35 a.m., Richards got out of the automobile and placed petitioner under arrest (R. 8, 72, 107). Then Williams, having reason to believe that Smith would be inside the house (because he had been informed by Anderson of Smith's presence and participation in the prior trans-

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[1] The officers also had daytime search warrants for three automobiles (R. 36) upon which the officers did not rely (R. 37) and which they returned unexecuted (R. 40).

actions), walked into the house, found Smith sitting on the couch in the living room, and arrested him (R. 8, 33, 108). The arrests in both instances were based both upon the warrant and upon the fact that petitioner and Smith had committed felonies, *i.e.*, violations of the Revenue Laws, in the presence of Investigator Anderson on March 5 and March 8 (R. 180).[4]

After the arrests were effectuated, the officers searched the Plymouth which was parked in the back-yard ten or fifteen feet from the back steps where petitioner had been arrested (R. 34). This was the vehicle from which Anderson had unloaded illicit whisky during one of the previous transactions (R. 78). They found 20 gallons of nontax-paid whisky inside (R. 9, 107). They also entered the garage, which was 65 feet from the house (R. 195), and searched a 1951 Ford in which they found an additional 186 gallons (R. 9, 107). Additionally, a rear room in the garage was searched to determine if any whisky was there (R. 85-86), but none was found.

The district court made no finding as to the validity of the arrest warrant, stating only that it presented an "interesting question." It ruled that the arresting officer had probable cause for the arrest and "a reasonable search of the premises as an incident

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[4] Government counsel announced at the start of the hearing on the motion to suppress that the government would seek to support the arrest and resultant search both on the basis that the warrant was valid and on the basis of probable cause (R. 22). Reliance on the search warrants, however, was specifically disclaimed (R. 215).

to that lawful arrest." The court concluded "that the search and seizure were not invalid, were not too extensive, and were reasonable under the circumstances" (R. 218).

2. *Entrapment*

In support of his claim of entrapment, petitioner, who testified on direct to prior convictions, stated that upon his release from his last incarceration in November 1960 he determined for reasons of health and consideration for his family that he would not enter the business again (R. 305-307). He claimed that he was not in the business when Daniels first communicated with him, and that Daniels had begged him to obtain whisky, saying his wife was in the hospital and he was out of a job and broke. Since Daniels was a friend for whom he had furnished whisky in the past, he obliged (R. 310-311). He said he made no profit on the transaction, selling the whisky for his cost of $4.00 a gallon. He contended that Daniels talked to him for an hour and a half, kept after him, and caught him "off balance" (R. 309). Petitioner's wife also said that Daniels gave her the same sympathy-evoking reason for wanting petitioner to furnish him whisky (R. 289).

The government's evidence presented a different story. Daniels, who had in the past hauled illicit whisky for a man in the business but had not himself been an entrepreneur (R. 254, 264), and who admitted he was paid $10 a day by the government while working on the case and given a $250 reward upon its successful completion (R. 253), stated that

it was petitioner and not he who had made the initial contact and proposed doing business (R. 252). He specifically denied either playing upon petitioner's sympathy or being told by petitioner that the latter was no longer in the business (R. 280). Both Daniels and Anderson testified that petitioner told them that if they all stuck together, were slick and played it smooth, they could make a lot of money (R. 224, 248). Anderson added that immediately after the introduction, petitioner asked if they could come to his house that night and pick up a load of whisky from him (R. 235-236). Petitioner, in his initial conversation with Anderson, at first asked $7.00 a gallon, and, when Anderson balked at the price, went down to $5.00 if Anderson and Daniels would do the hauling (R. 221). The March 5 and March 8 purchases were at the rate of $5.00 a gallon (R. 221-223).

The court, in its instructions to the jury, stated that the gist of entrapment is the conception of the crime by a government agent for the purpose of prosecuting a defendant who had no previous intention to commit it (R. 332), and that the key question "is not one of laying a trap or of trickiness or deceit, but one of seduction or improper inducement to commit crime" (R. 334-335). The court specifically instructed that a suspect may not be tested by being put under extraordinary temptation or inducement, as for example by an appeal to his humanity or by the offer of a fabulous price, and that a person acting for the government could not organize a plot to break the law and then prosecute for it (R. 334). The court in-

structed that the evidence of petitioner's prior convictions could properly be considered "for whatever bearing the jury may think and find it has, if any, upon this question of entrapment" (R. 335).

ARGUMENT

1. As the courts below held, there was probable cause for petitioner's arrest independent of the warrant of arrest. Section 7608(2)(3) of Title 26, U.S.C., gives to an agent charged with enforcing the alcohol tax provisions of the Internal Revenue Code the right to make arrests without warrant "for any felony cognizable under the laws of the United States if he has reasonable grounds to believe that the person to be arrested has committed, or is committing, such felony." An arrest may be justified on this statutory authority even though the agents also had a warrant which proved to be invalid. *United States* v. *Rabinowitz*, 339 U.S. 56, 60; *Go-Bart Co.* v. *United States*, 282 U.S. 344, 356; *Stallings* v. *Splain*, 253 U.S. 339, 342. The facts set forth in the Statement show that the agents had good reason to believe that petitioner was in the illegal liquor business and had committed a felony.

The hour of arrest furnishes no basis for complaint in this case since petitioner himself had told the agents to come after 10 p.m. The time was fixed

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Giordenello v. *United States*, 357 U.S. 480, is not to the contrary. There the probable cause argument was advanced for the first time in this Court, and the Court refused to hear it because it had not been raised below. See 357 U.S. at 488.

to coincide with a proposed illegal business transaction. There was thus every reason to believe (as turned out to be the fact) that although the hour was late, the defendants would be awake and ready to do business.[5] Nor can it be said that the officers had stale information. In addition to knowledge of the prior consummated sales, they knew of the arrangements to purchase whiskey that very night. The officers were not required to act after the first sale. As this Court observed in *United States* v. *Rabinowitz*, 339 U.S. 56, 65, "[s]ome flexibility will be accorded law officers" in the exercise of their judgment "as to when to close the trap."

While, therefore, there is no need to rely upon the warrant of arrest, we believe that the warrant meets the requirements of Rules 3 and 4 of the Federal Rules of Criminal Procedure, as interpreted by this Court in *Giordenello* v. *United States*, 357 U.S. 480. The complaint set forth on its face all of the elements of a violation of 26 U.S.C. 5205(a)(2) and

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[5] Petitioner suggests that *Jones* v. *United States*, 357 U.S. 493, 499-500, has left open the question whether a "forceful nighttime entry into a dwelling to arrest a person reasonably believed within" can constitutionally be made when the arrest is based upon probable cause rather than upon a warrant. The simple answer here is that petitioner was arrested outside of his house, so that there was no entry, forceful or otherwise. Nor was there even a trespass, since the arresting officer accompanied Investigator Anderson, who was invited and expected. To be sure, Smith was arrested inside the house, but that arrest was not the basis for the search; no force was used to enter the house (the door was open, R. 25), and the officers had the right to enter the house to arrest another violator.

5604(a): to wit: (1) the sale (2) by petitioner (3) of nontax-paid whiskey. That the whiskey was nontax-paid appeared clearly as the personal knowledge of the complainant, since he stated that it was delivered to him by the purchaser. The naming of the purchaser showed that the whiskey was in fact sold, that the seller was petitioner, and that the purchaser was the source for the affiant's belief that a sale of the whiskey had been made by petitioner. The fact that the information relied upon was technically hearsay would not render the warrant invalid. *Jones* v. *United States*, 362 U.S. 257. The complaint named the informant and showed corroboration by the delivery of the whiskey. It therefore set forth sufficient facts to enable the commissioner to conclude that there was "substantial basis" to believe that the sale had "probably" taken place. See *Jones* v. *United States*, 362 U. S. at 271.

2. Since petitioner's arrest was lawful, it was lawful to search "the premises under his immediate control." *Harris* v. *United States*, 331 U.S. 145, 151. This included his house and his entire curtilage. *Williams* v. *United States*, 273 F. 2d 781, 795 (C.A. 9), certiorari denied, 362 U.S. 951; *Kelley* v. *United States*, 61 F. 2d 843 (C.A. 8); *Bartlett* v. *United States*, 232 F. 2d 135 (C.A. 5); *Crawford* v. *United States*, 160 F. 2d 629 (C.A. 4); accord *Townsend* v. *United States*, 271 F. 2d 445 (C.A. 4), certiorari denied 362 U.S. 921. The only limitation is that the search not go "beyond that which the situation reasonably demanded." *Harris* v. *United States*, *supra*, at 152-153.

The search here was for the limited purpose of finding whiskey (which was supposed to be delivered that night) and was limited in scope to the garage, the automobile therein, and the automobile in the yard. The house was entered only to find Smith and was not searched. The search of those areas was reasonable. Since petitioner had told Daniels not to come until 10:00 or 10:30 p.m. (R. 188, 252), it was reasonable to assume that the late hour was to enable petitioner to bring the whiskey to his house, and hence that he would have it in his possession at that time.[1] It was therefore natural to assume that the whiskey would still be in the vehicles in which it had been transported or in the garage. Moreover, one of the vehicles searched was that from which Anderson had himself unloaded whiskey during a previous transaction. The search was properly confined to an area outside the house where the contraband would likely be found.

3. The question of entrapment was one for the jury under proper instructions. *Sorrells* v. *United States*,

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[1] The fact that on March 8 petitioner did not have the whiskey on hand, but sent Smith for it, meant only that the officers were not certain that the whiskey would be at the house when the arrests were effectuated. Since the whiskey had been at the house on March 1 and March 5, they had reason to believe that it would be there again on the night of the arrest. Moreover, the reason for the variance in procedure on March 8 was that petitioner at that time was suspicious of Anderson (R. 223). Since petitioner was willing to deal with Anderson and Daniels on the arrest night, the officers had reasonable grounds to believe that he had abandoned his suspicions and that the whiskey would be at the house when they arrived.

287 U.S. 435; *Sherman* v. *United States*, 356 U.S. 369; *Masciale* v. *United States*, 356 U.S. 386. Here, petitioner supported his contention primarily by his own and his wife's self-serving testimony, with the single additional allegation that he made no profit on his initial sale to Daniels. The evidence to the contrary was overwhelming. There was the testimony of Daniels that petitioner made the initial contact; the fact that, even by his own reckoning, he made (or stood to make on the April 24 transaction) a profit on all subsequent transactions and initially asked a price of Anderson that would have given him an even greater profit; the testimony that immediately upon meeting Anderson he asked if the latter could come to his house that night to pick up a load of whisky; the testimony that he talked of the money they could all make if they worked together; and the fact that the quantity of whisky seized at his arrest was almost twice the total that he had sold to Daniels and Anderson in the three prior transactions.* This was clearly sufficient evidence to go to the jury.

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*When questioned on cross-examination concerning the 206 gallons found in his possession when he was arrested, petitioner would only say: "Well, that was—I'm very easily led. I can be led into anything, and somebody just keeps pounding and pounding on me, I'll go ahead and do it for them" (R. 311).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1963.

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